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IN THE

Supreme Court of the United States

October Term, 1964

No. 640

BEN B. BURROWS,

Petitioner,

vs.

WAGGONER CARR, the Attorney General of the State of Texas, THOMAS C. LYNCH, Attorney General of the State of California, and FORREST M. SMITH, ERNEST M. GROOS and T. C. FROST, Trustees of the Morrison Trust,

Respondents.

Brief in Opposition for Respondents, FORREST M. SMITH, ERNEST M. GROOS and T. C. FROST, Trustees of the Morrison Trust.

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Respondents.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio.

Brief in Opposition for Respondents, FORREST M. SMITH, ERNEST M. GROOS and T. C. FROST, Trustees of the Morrison Trust.

Opinions Below

The Declaratory Judgment of the District Court of the 131st Judicial District in Bexar County, Texas, is unreported. The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio is reported at 373 S.W. 2d 514. Ben B. Burrows' Petition and Motion for Rehearing

in the Court of Civil Appeals was denied without written opinion. His Petition for Writ of Error in the Supreme Court of Texas, as well as his Motion for Rehearing thereon, were denied without written opinion.

Jurisdiction

Petitioner's application in the Supreme Court of Texas for writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas was refused on March 18, 1964. (Respondent's Tr. 1) The motion for rehearing of the application for writ of error was overruled on July 15, 1964. (Respondent's Tr. 1) The ninety-day time limit within which the petition for writ of certiorari and the certified record required by Rule 21 of this Court must be filed expired on October 13, 1964.

The petition for writ of certiorari was received by the clerk of this Court on October 14, 1964, and was filed in this Court on October 29, 1964, both dates being more than ninety days since the entry of final judgment by the Supreme Court of Texas (July 15, 1964). The certified record was received by the clerk of this Court on October 29, 1964, and was filed in this Court on October 29, 1964, both dates being more than ninety days since the entry of final judgment by the Supreme Court of Texas. The judgment of the trial court and the opinion of the Court of Civil Appeals contained in the appendices to the petition for writ of certiorari do not satisfy the requirements of Rule 21 and 22 of this Court and are applicable only to Rule 23(1) (i) and (j).

The period for applying for a writ of certiorari has not been extended by a Justice of this Court (U.S.C., Title 28, Sec. 2101(c) and Rule 22 of this Court).

Therefore, petitioner's application for a writ of certiorari is out of time and should be denied.

Question

Whether the Courts of the State of Texas have authority to determine the meaning and effect of a Texas testator's testamentary trust and whether the Courts of Texas can declare certain provisions of such trust invalid as being in violation of the laws and public policy of the State of Texas where the res of the trust has its situs in Texas and all the trustees of such trust reside and administer the same in Texas.

Statement

R. W. Morrison, the testator, was domiciled in San Antonio, Bexar County, Texas, on the date of his death and for many years prior thereto. His last will and testament was probated in the County Court of Bexar County, Texas, and the estate was administered through this Court. Through his will, the testator created a trust which provided, inter alia, for the establishment by his Texas Trustees of Clinic-Hospitals in California, Texas and New Mexico, the first of which the Trustees were directed to establish in California.

The trust was to be administered in the State of Texas and all of the property of the trust is located in Texas. All of the trustees are, and their successors are to be, residents of San Antonio, Bexar County, Texas.

The trustees were vested with control over all fiscal affairs and policies of the trust. The will provided that the assets of the trust (which would include Clinic-Hospital real and personal property) should at all times be fully possessed, managed and controlled by the trustees, whose duties were to be similar to the duties of a board of directors of an ordinary corporation. The testator provided the Trustees with a manager of the trust.

The trust also provided for a Clinic-Hospital committee which was given sole authority as to Clinic-Hospital operations, after the Clinic-Hospitals had been established by the Trustees. The committee was to be composed of three individuals, including petitioner Ben B. Burrows, a chiropractor licensed under the laws of California and Michigan. The other two members and all committee successors were to be trained in the same art and science as practiced and advocated by Ben B. Burrows. The Trial Court declared that members of the committee and those who would assist the committee should be licensed chiropractors and should be licensed to practice chiropractic in the State of California. The committee members, other than Ben B. Burrows, were to be chosen by the Trustees from a list of five names submitted by Ben B. Burrows. The salaries of the clinic-hospital committee members, above stated minimums, were to be controlled by the Trustees. The members of the clinic-hospital committee were subject to dismissal by the Trustees for failure or refusal to operate any clinic-hospital in full accordance with the directions contained in the will, or for failing or refusing to properly account for funds.

The will provided that the clinic-hospitals "shall be devoted exclusively to the scientific study, research and improvement of existing methods, and to the de-

velopment of new methods of treating and of preventing human sickness, particularly with respect to the effects on human health of nutrition, blood chemistry, radionics and electricity, and to methods of non-medicinal healing, and to applying the knowledge so acquired in the treatment of human sickness."

This suit was instituted by the Trustees asking for a declaratory judgment construing numerous administrative provisions of the trust and for the determination of the validity or not of the clinic-hospital provisions of the trust. The Trial Court held "that the establishment, maintenance and operation of such a clinic-hospital in the State of Texas in the manner set forth in the testator's will would be violative of the laws and public policy of the State of Texas and such clinic-hospitals provisions of said testator's will are invalid in the State of Texas." The Trial Court further held "that the validity of the clinic-hospital provisions of the trust insofar as it authorizes the acts to be performed by such Clinic-Hospital Committee in the State of California is to be determined with reference to California law and not Texas law."

The Court of Civil Appeals, and the Supreme Court of Texas by its denial of petitioner's application for writ of error, agreed with the trial court that the establishment, maintenance and operation of such clinic-hospitals in the State of Texas in the manner provided in testator's will was violative of the laws and public policy of Texas and therefore invalid. The Court of Civil Appeals held in reversing the judgment of the Trial Court that the establishment, maintenance and operation of one or more of the clinic-hospitals beyond the borders of the State of Texas did not alter

or change the illegality or invalidity of the clinic-hospitals provisions of the Trust. The Court of Civil Appeals further held that revenues from Texas land and personal property being administered by Texas trustees under Texas law could not be used for such purposes in Texas or elsewhere.

From this judgment petitioner Burrows appealed to the Supreme Court of Texas by filing in such court his application for writ of error to the Court of Civil Appeals. (The Attorney General of California did not prosecute his appeal from the judgment of the Court of Civil Appeals which was adverse to his contention in such court. This latter judgment has long since become final as to the Attorney General of the State of California.)

The Supreme Court of Texas refused petitioner Burrows' application for writ of error to the Court of Civil Appeals and overruled his motion for rehearing on his application for writ of error.

Argument

The issue in this case is a narrow one — the construction and determination of the meaning and validity of certain provisions of a testator's testamentary trust created in his last will which was probated in Texas, with all assets of said Trust having their situs in Texas, and administered in Texas by Texas trustees. This set of facts presents a Texas question upon which the Texas courts speak with final authority. In an analagous situation this Court in *State of Arkansas* vs. *State of Texas,* 346 U.S. 368, 74 S.Ct. 109, 98 L.Ed. 80 (1953), stated:

> "The central question which the case tenders is whether the William Buchanan Foundation has authority to spend its funds for furtherance of this Arkansas project. That is necessarily a question of Texas law, for the Foundation gets its existence and its powers from Texas. Texas courts speak with authority on those issues. Were we to undertake to resolve the questions we might find ourselves in conflict with the courts that have the final say."

The Trustees of the Morrison Trust, although fully realizing that under the laws of the State of Texas there are serious questions as to the validity of the clinic-hospital provisions of the Trust, did not take an adversary position in the Trial Court or on appeal with respect to the validity of the clinic-hospital provisions of the Trust. In filing their petition for a declaratory judgment in the Trial Court the Trustees prayed for a judgment construing numerous administrative provisions of the Trust, as well as for a judgment determining the validity or not of the clinic-hospital provisions of the Trust. By filing their petition the Trustees invoked the jurisdiction of the District Court of Bexar County, Texas, which is the only court under the facts of this case vested with power to determine the validity or not of the clinic-hospital provisions of the testamentary trust created in the will of R. W. Morrison, who had his domicile in Texas, which will was probated and administered in Texas, with all assets of the Trust having their situs in Texas, and all of the Trustees being residents of Texas. In opposing petitioner's application for writ of certiorari the Trustees take an adversary position and here contend as they did below that the Texas courts are the final authority on construction of the Trust and on the issue of validity or not of the clinic-hospital

provisions of the Trust; that they, as Trustees, are answerable and accountable to Texas courts, and to the Texas courts alone, with respect to their administration of such Trust. The courts of this state have continuing jurisdiction over the acts of trustees in the management of trusts, either public or private. In the case of public trusts the Attorney General of the State is vested with the power and authority to represent the people of Texas so that they may be assured that the trustees of such trusts carry out the provisions of valid public trusts. For the trustees of such trusts to be answerable to the courts of more than one state would be to require that they serve two masters. This no court of justice will do.

The Trustees submit that under the facts of this case the law of Texas, and only the law of Texas, controls as to the validity of the testator's testamentary trust. *Crossland* v. *Dunham*, 135 Tex. 301, 140 S.W. 2d 1095 (1940); *DeVaughn* v. *Hutchinson*, 165 U.S. 566, 17 S.Ct. 461, 41 L.Ed. 827 (1897); *Cavers*, 44 Harvard Law Review 161 (1930); *Scott on Trusts*, Secs. 391 and 394; *Restatement of Conflicts*, Secs. 243 and 299.

In announcing the foregoing rule the Supreme Court of Texas in *Crossland* v. *Dunham*, *supra*, states:

> "On final trial in the district court, that court construed this will as contended for by Mrs. Crossland. On appeal, the Beaumont Court of Civil Appeals reversed the judgment and interpretation of the district court, and held 'that the effect and construction of wills is to be determined by the law of the testator's domicile, in so far as it relates to personal property, and by the laws of the state

where the property is situated, in so far as it relates to reality. *DeVaughn* v. *Hutchinson*, 165 U.S. 566, 17 S.Ct. 461, 41 L.Ed. 827; *Holman* v. *Hopkins*, 27 Tex. 38; *King* v. *Lowry*, Tex. Civ. App., 80 S.W.2d 791, writ refused.' [115 S.W.2d 744]. As applied to this case the opinion of the Court of Civil Appeals, in effect, holds that since all the property, real and personal, owned by Mr. Dunham at the time of his death was situated in Texas, and since Mr. Dunham at the time of his death resided in Texas, the laws of Texas will determine the effect of this will, and the property, both real and personal, to pass thereunder.

"We have carefully considered the above holding of the Court of Civil Appeals in the light of the briefs and arguments of counsel on both sides, and in our opinion the opinion of the Court of Civil Appeals announces the already settled rule of law in this State."

The fact that a portion of the Trust's endeavor is to be accomplished in California does not alter the Texas courts' power over all acts of the Trustees in their administration of the affairs of the Trust. Petitioner endeavors to create the impression that the clinic-hospital's operation is unrelated and disconnected from the Trust; that the only function of the Trustees is to transmit Texas funds to the Clinic-Hospital Committee in California for unsupervised spending by the Committee. This impression is incorrect and without basis. The duties of the Trustees in relation to the clinic-hospitals are many and varied. Not only are the Trustees directed to establish and provide the physical plant in which the clinic-hospitals are to operate, and to maintain complete control over all fiscal affairs of the Trust, but they are also given sub-

stantial supervisory powers over the Clinic-Hospital Committee. The Trustees have the authority and duty to dismiss a committee member who fails or refuses to operate the clinic-hospitals in full accord with the directions contained in the will, or to faithfully account for funds.

The Clinic-Hospital Committee has authority over clinic-hospital operations, but these operations cannot commence until the first clinic-hospital has been established by the Trustees, which they must do by providing with trust funds the physical property and equipment necessary for the operation of the clinic-hospital by the Committee. Implicit in the acts of the Trustees in establishing the first clinic-hospital in California, after first obtaining the best counsel and advice available, is the acquisition of land in California by purchase or lease, the construction or leasing of a building in California by the Trustees suitable for housing such clinic-hospital, and the equipping of such building so as to make it ready for operation by the Committee. The will clearly anticipates that the Committee members will perform in the area of their greatest competence, that of the practice of chiropractic. The Trustees, experienced business men and bank presidents, are charged with the fiscal and business responsibilities of the Trust. The Committee members are employees of the Trust, and by reason of this relationship the Trustees are legally responsible for the Committee's activities in the operation of the clinic-hospitals. Thus it is apparent that the Clinic-Hospital Committee is merely an arm and agency of the Trust; the title to all clinic-hospitals properties, both real and personal, are vested in the Trust, and the Trustees are the sole authority as to all assets of the Trust.

The charitable purposes of the Morrison Trust are not destroyed or endangered by the holding of the Court of Civil Appeals. The Trustees of the Morrison Trust are enjoined by the testator in the event that they are not able to operate the clinic-hospitals exactly as specified, to operate them for purposes as near to those specified as in their judgment may be done.

The Trustees respectfully submit that there is no federal question involved in this case, and that all matters in issue are governed by the laws of the State of Texas. The Texas courts having spoken, the Trustees stand ready to carry out the charitable provisions of the Trust as interpreted by the courts of Texas.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari be denied.

Dated: November 17, 1964.

CHAS. W. DUKE

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Forrest M. Smith, Ernest M. Groos and T. C. Frost, Trustees of the Morrison Trust

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